No. 7937

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

RICHARD C. HYLAND, doing business under the fictitious name and style of Hyland Bag Company,

Appellant,

vs.

MILLERS NATIONAL INSURANCE COMPANY (a corporation), DUBUQUE FIRE & MARINE INSURANCE COMPANY (a corporation), NATIONAL RESERVE INSURANCE COMPANY (a corporation), MINNESOTA FIRE INSURANCE COMPANY (a corporation), FIREMEN'S INSURANCE COMPANY OF NEWARK, NEW JERSEY (a corporation), THE MERCHANTS FIRE INSURANCE COMPANY (a corporation), WESTERN INSURANCE COMPANY OF AMERICA (a corporation), and NATIONAL LIBERTY INSURANCE COMPANY (a corporation),

Appellees.

BRIEF FOR APPELLEE, NATIONAL LIBERTY INSURANCE COMPANY (A CORPORATION).

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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As outlined in the opinion of the District Judge in this case, there were three what we might term

"groups" of insurance companies who are defendants in this action. The first group of companies carried what we can call the "primary" insurance on plaintiff's stock of goods up to $50,000; the second group covered loss on these goods in excess of $50,000 and up to $100,000, and the third, consisting of this appellee, had issued two cover notes totaling $85,000, making a total insurance of $185,000 on plaintiff's stock of goods.

As shown by the pleadings, there was some conflict between the three groups of insurance carriers as to their contribution in the event of loss under the policies, this appellee contending that its insurance was to attach only when goods in excess of $100,000 were on the premises and then only as to such excess. Each group of companies, therefore, was represented at the trial by separate counsel. With respect to the defense that plaintiff is barred from recovering by reason of his fraud and false swearing, the interests of all of the defendant companies are identical, and, as this was the principal defense presented at the trial, the three groups of defendants joined forces in presenting this issue to the trial court. This issue has been determined in favor of the insurance companies, and the court, having found that plaintiff was entitled to no recovery by reason of his fraud and false swearing, had no reason to consider the question of contribution between the companies.

The question now before this court is whether the lower court's judgment that plaintiff be denied recovery by reason of his fraud and false swearing shall

be sustained on appeal. Although, as we have already stated, as to this issue the defendant companies are all acting in unison, it has been deemed advisable by counsel that separate briefs be filed by counsel for the three appellee groups of companies. In so doing we do not believe the result will be to increase the burden of the court in the consideration of this case, and, although there may be some duplication in the three briefs, it is our thought that it might aid the court to have the benefit of the separate viewpoints of the various counsel with respect to this case.

HISTORY OF THE CASE.

The plaintiff, Richard C. Hyland, prior to October 19, 1929, was the sole owner of a bag and burlap business conducted in a small four-story building on Sacramento Street in the City and County of San Francisco, which he held under lease. He had been conducting this business for a number of years prior to that date under the name of "Hyland Bag Company." Shortly prior to the fire he greatly increased his insurance coverage so that on said date he was carrying insurance on his merchandise and stock in the amount of $185,000; $96,000 on furniture, fixtures and equipment, and $120,000 on use and occupancy, a total of $401,000 of insurance. In the evening of October 19, 1929, a fire took place in his premises. This fire was undoubtedly of incendiary origin, it having started in four different places, at which places kerosene or kerosene soaked rags were

found after the fire. (Tr. 1842-44, 1910, 1965, et seq.) Plaintiff was not on the premises at the time of the fire, but arrived there within a few minutes afterwards, and his attention was called to the kerosene and the fact of the four separate fires. This case deals only with the loss on the stock of merchandise the total amount of insurance on which was $185,000, represented by the insurance written by appellees. In due course, plaintiff filed proofs of loss sworn to by him, claiming loss in the sum of $73,601.96. The claim being declined, this suit was brought and, in the original complaint, plaintiff's claim was raised to $76,-498.62. At a later date he filed an amended complaint raising the amount of his loss to $106,992.83. It was on this latter complaint that the case went to trial. In his testimony at the trial plaintiff contended his loss was in the neighborhood of $108,000. The trial below consumed the greater part of three months, there being in the neighborhood of fifty trial days. In addition to the vast amount of testimony, over 200 exhibits were introduced in evidence, which exhibits include among other matters the most important pieces of evidence considered by the lower court. These last mentioned exhibits consisted of photographs, charts, diagrams and a complete model of the building, built to scale, together with models, also built to the same scale, of bales of burlap, machinery, rolls of twine, etc., so that the building, together with all of the machinery and also the insured material was reconstructed before the court. The trial judge also visited the building where the fire had taken place, at a time when such building was in approximately the same condition

as it was immediately following the fire, the only repairs being the replacement of a portion of the floors around the stairways. The condition of the joists, ceilings and walls of the building was the same as it had been immediately following the fire. The court was, therefore, able to see for himself exactly what damage the fire did to the *building*. As a matter of fact, we understand that the building is still in the same condition and could even now be examined by this court. At the close of the testimony, the trial judge listened to nearly four days of argument, following which, after an extended study of the exhibits and transcript of testimony, he prepared his opinion.

Plaintiff was represented in the lower court by very able counsel and was afforded every opportunity by the trial court to prove his innocence of the charges of fraud and false swearing. It has taken appellant four years to bring this case up for hearing before this court, and he does so on a record of some 3500 pages in length. Much of the testimony in the record has reference to the various charts, photographs, models and other exhibits introduced in evidence, and a full and complete picture of the case as presented to the court below cannot be obtained from even a reading of this voluminous record. The photographs taken the morning after the fire by the police department show more clearly than can the testimony of any witness how small the actual fire damage was and how absurd is the claim that hundreds of large bales of tightly wrapped burlap were burned out of sight in the fire. This is also true of the model of

the building, with which it was demonstrated beyond peradventure of a doubt that the material claimed by plaintiff to have been destroyed in the building could not have been contained therein and at the same time permit of the manufacturing operations which were in progress.

Although certain somewhat technical points are made in appellant's brief, the main contention therein seems to be that the evidence is insufficient to support the findings of the lower court. In support of this contention, appellant's brief does little more than refer to a few excerpts from the testimony of plaintiff himself and his own witnesses, and in replying to such a brief we are faced with the necessity, to a certain extent, of analyzing the testimony and pointing out the evidence supporting the lower court's findings. It is a difficult task, in view of the vast amount of evidence, to do this without extending our brief to great lengths. We will endeavor herein, however, to point out the more important and salient features of the evidence which fully support and sustain every finding and statement made by the trial court in his opinion.

THE ERRORS RELIED UPON BY APPELLANT.

Although ten errors are listed in appellant's brief, a number of them really are to the same effect. They can roughly be grouped as follows:

1. Objections to the findings of fact and conclusions of law;

2. The insufficiency of the evidence;

3. That the court erred in holding that the failure to settle the loss by arbitration was due to plaintiff and his appraiser.

We will now proceed to a discussion of these points.

I.

THE TRIAL COURT DID NOT ERR IN DENYING PLAINTIFF'S MOTION FOR SPECIAL FINDINGS.

Counsel contend that the memorandum opinion which was adopted by the District Court as his findings of fact and conclusions of law is not sufficient in the following particulars:

(a) That the findings of fact and conclusions of law are not separately stated;

(b) The opinion (if considered as findings) is discursive, argumentative and indefinite;

(c) The court failed to find on the principal issues of the case, to wit, the amount of appellant's loss and the alleged false swearing in reference thereto;

(d) Many of the findings or purported findings are not within the issues.

The memorandum opinion of the District Court appears in the transcript, pages 174 to 204.

In answering point (a) above, we need merely quote from the decisions of this court.

In *Parker v. St. Sure,* 53 F. (2d) 706, this honorable court stated, at page 709:

> "In these cases (therein cited) the district judge filed an opinion and adopted the same as his findings of fact and conclusions of law. We see no objection to this course. Until the opinion is adopted by the court as its findings of fact and conclusions of law, it is not a part of the record."

In *National Reserve Insurance Co. v. Scudder,* 71 F. (2d) 884, 888, this court considered the exact contention now being made by appellant, and there stated:

> "Error is assigned to the action of the court in denying appellant's motion 'for findings and judgment'. The record discloses that at the time the motion was denied the court entered an order 'that a decree be entered in favor of the plaintiffs as provided in the memorandum opinion this day filed, and that said opinion be and is adopted as the findings of fact and conclusions of law herein'. In discussing this assignment, appellant says: 'The numerous errors made in this memorandum opinion both in regard to the facts and to the irrelevant statements therein, which apparently caused an erroneous conclusion on the part of the trial judge, indicates the danger of allowing memorandum opinions to be substituted for the findings of fact provided by the rules of the court. It is our contention that our motion for findings should have been granted by the court in accordance with Equity Rule 70½. (28 USCA sec. 723.) In any event, we believe the case is one for the appellate court to exercise its full equity jurisdiction and decide the case de

novo in accordance with the equities disclosed by the evidence'.

While Equity Rule 70½ requires that 'the court of first instance shall find the facts specially and state separately its conclusions of law thereon', and a literal compliance therewith would be attended with undoubted advantages to an appellate court and facilitate the presentation and consideration of appeals, we think the mere fact that the findings and conclusions—if sufficiently specific and otherwise in compliance with the rule—are set forth in the court's written opinion and adopted by the court as such findings and conclusions, is not such a violation of the rule as calls for a reversal of the decree."

It is true that the District Court did not place his findings of fact and conclusions of law under separate headings, but we fail to see how the appellant could have suffered any prejudice by the court's failure so to do. The purpose of findings of fact and conclusions of law is to inform the appellate court of the basis upon which the decision below was rendered. We could not conceive of a case where a court had made more clear the facts found by him and the legal conclusion reached as a result thereof. The lower court was careful not only to state the findings of fraud and false swearing in general terms, but went further and pointed out many of the particulars in which the record disclosed such false swearing. The opinion also cites the authorities and the legal principles upon which the decision is based. The lower court's action in adopting his opinion as the findings

of fact and conclusions of law has incorporated into the record in a far more clear and complete way the basis of the decision below than any set of formal findings of fact and conclusions of law could possibly have done. It would have been, indeed, an idle act for the court, after adopting its opinion as the findings, to have proceeded to make formal findings, which would have added nothing to the clear and complete statement of the basis for the decision.

Appellant next complains that the memorandum opinion, if considered as findings of fact, is discursive, argumentative and indefinite. We do not believe counsel is seriously contending that there would be any doubt or uncertainty in the mind of any person reading the memorandum opinion as to what is the basis in fact and in law for the lower court's judgment. Counsel picks out certain informal phrases in the opinion wherein the District Judge explains the basis of his findings and gives his reasons for going into the details of the proof therein. Of course, these particular statements standing alone do not constitute findings, but we fail to see how it can be successfully contended that the District Judge does not make it plain in his opinion that he finds, as a matter of fact, that plaintiff was guilty of false swearing with respect to the amount of the loss claimed by him. The findings must be taken as a whole. Counsel's criticisms of certain isolated phrases wherein the formal language customarily found in findings is not used can form no basis for a claim that the findings should be rejected and the judgment reversed.

If the court in the course of his opinion makes findings which reflect upon the integrity of the plaintiff, the evidence in the case overwhelmingly supports the conclusion reached. Counsel in support of this proposition refers to a statement by Mr. Justice Butler in his dissenting opinion in *Los Angeles Gas and Electric Corporation v. Railroad Commission,* 289 U. S. 287, 327, 53 S. Ct. 637, 652, 77 L. ed. 1180, 1204, where the court says:

> "The command that the trial court 'shall find the facts specially' means at least that the statement shall be definite, concise and complete as distinguished from discursive, argumentative, obscure or fragmentary."

It is difficult to see how findings could have been more definite and more complete than those of the lower court in this case. Counsel may seek to criticize them on the ground that they are not concise, but he can hardly contend that they are argumentative, obscure or fragmentary.

Appellant next complains that the court failed to find upon the principal issue in this case. Counsel's complaint in this behalf is that the court did not make a definite finding as to the actual amount of the loss, but contented himself with finding that plaintiff was guilty of fraud and false swearing in exaggerating and falsifying the amount of his loss. This court has many times announced the rule that findings are only required on such issues as will support the decree.

In *Parker v. St. Sure,* supra, the court, speaking through Circuit Judge Wilbur, stated (53 F. (2d) 708):

> "The rule is well settled, in states where findings are required by law, that it is not necessary to make findings on all defenses wherein findings actually made require a judgment in favor of either party. We do not believe that the Supreme Court intended to extend this rule by Equity Rule No. 70½ so that in every case there must be specific findings upon every issue, regardless of the fact that findings actually made sustain a decree, nor do we believe that it was the intention of the Supreme Court to introduce into equity and admiralty practice the difficulties inherent in the preparation of precise findings upon every material issue involved in the litigation. The rule is evidently intended to advise the courts on appeal of the decision of the trial court as to the material issues. It is obvious that, where the judgment of the trial judge, in determining the controverted issue of fact, is given great weight upon the appeal, in case of conflicting evidence by witnesses who testify in the presence of the judge, the appellate court in exercising its jurisdiction in equity and admiralty cases should be advised of the conclusion of the trial court as to where the truth lies as between witnesses who contradict each other."

The court, having found that the plaintiff was guilty of fraud and false swearing in the proofs of loss, in the pleadings, and in his testimony (R. 203), with respect to the amount of his loss, such finding necessitated a judgment in favor of the defendants, and there was no necessity whatever for any of the other issues to have been decided. As stated above, where the findings made require a judgment in favor

of one party or the other, such findings are sufficient. The court found, with respect to the claim made in the amended complaint and in the testimony of plaintiff that $46,000 worth of merchandise was burned out of sight, that such claim was false and stated that, in his opinion, not over $2000 worth of merchandise was burned out of sight. (R. 185.) He also finds that the prices on the damaged merchandise, which prices were used to make up plaintiff's claim of loss, were fraudulently padded by plaintiff. It was not incumbent upon the court to make a finding with respect to the amount of the loss unless plaintiff was entitled to recover. When we consider that the claim that a large quantity of merchandise was burned out of sight has been found to be false and that the prices used to make up the claim on the damaged merchandise have been fraudulently padded, and when we also consider the testimony of defendants' disinterested witnesses that 75% of the merchandise taken out of the building after the fire was wholly undamaged, the court, if called upon to make a finding as to the actual amount of loss, would, of course, have found it to be an amount far less than the figure given in the proofs of loss. A finding as to the exact amount of the loss, however, was unnecessary under the circumstances.

Appellant seeks to place some reliance on the fact that, in the pleadings of the defendants with respect to the false swearing, the statement was made that the actual loss sustained by plaintiff did not exceed $35,000 and that he knew of that fact when he filed his proofs of loss in a far greater sum. Counsel seems

to argue that, in view of this statement in the pleadings, it was necessary for the court to make a specific finding that the actual loss was less than $35,000 in order to sustain the defense of fraud and false swearing. These pleadings were, of course, filed long prior to the trial and defendants were never fully aware of the extent of the fraud and false swearing on the part of this plaintiff until the close of the trial. Considerable information was developed during the course thereof, and, furthermore, plaintiff swore falsely in his testimony at the trial, which, as we will later show, is sufficient to preclude his recovery. We know of no basis in law which would require a particular finding by the lower court that the amount of the loss was within the estimate made thereof by the defendants in their pleadings in order to sustain the plea of fraud and false swearing. Can it be that counsel is arguing that, if the evidence showed the actual loss was $40,000, which was in excess of the estimate of defendants, plaintiff could recover herein, even though he falsely swore in his proofs of loss that the amount thereof was $73,601.96, and that, in his pleadings and testimony, he falsely swore that the amount thereof was in excess of $106,000? The pleadings raised the issue of false swearing and the case was tried on that theory and the court has found accordingly.

A casual reading of the opinion of the trial court in the case now before this court clearly demonstrates the painstaking care with which the trial judge prepared his opinion in order to carry out the purpose of Equity Rule 70½ to enable this court to properly exercise its appellate jurisdiction. The trial court

discussed the evidence in considerable detail in order that the appellate court would be "advised of the conclusion of the trial court as to where the truth lies as between witnesses who contradict each other".

It would seem that such efforts should be commended as being helpful to the appellate court rather than denounced as making the findings "discursive, argumentative and indefinite".

It appears in the transcript that, in its memorandum and order denying plaintiff's motion for new trial, the trial court stated:

> "In the light of the argument upon the motion for new trial, there are two points in my opinion which I wish to clarify. * * * Second, in order to avoid any possible misunderstanding I find that plaintiff was guilty of wilful and intentional fraud and false swearing in making his proofs of loss." (R. pp. 232, 233.)

The opinion which was adopted as findings of fact and conclusions of law was clearly a sufficient finding on these issues of fraud and false swearing, even without the explanation given in the memorandum on motion for new trial, and such findings are sufficient to support the decree entered by the trial court.

See also:

Western Power Mfg. Co. v. Brewerton Coal Co. (C. C. A. 7), 81 F. (2d) 85, 89;

Standard Oil Co. of California v. McLaughlin (D. C., Cal.), 55 F. (2d) 274, 279;

Briggs v. U. S. A. (C. C. A. 6), 45 F. (2d) 479.

The next complaint is that many of the findings are not within the issues. The claim is that the District Court in finding that the values in the proofs of loss were padded and that there was deception in the prices, etc., was finding on issues outside the pleadings. Appellant does not contend that the defense of fraud and false swearing was not properly raised. Clearly these findings are directly responsive to the issue of fraud and false swearing.

We respectfully assert that the findings of fact and conclusions of law adopted by the trial court were in substantial conformity with equity rule 70½ and are sufficient to enable this court to properly exercise its appellate jurisdiction.

II.

THE ALLEGED INSUFFICIENCY OF THE EVIDENCE.

The second, third, fourth, ninth and tenth errors all fall under the above heading, and we will therefore discuss them herein before passing to the other points in the brief.

The second error relied upon is that the trial court erred in finding that plaintiff was guilty of fraud and false swearing in his proofs of loss and that there was overvaluation which resulted from an intentional fraudulent attempt to get an excessive award from defendant insurance companies, and furthermore any defense of false swearing was waived.

Appellant first calls attention to certain general rules with respect to fraud to the effect that fraud

without injury is never available as a basis of a cause of action. We do not feel it is necessary to meet counsel on this point, as the decisions are without conflict that in an action upon an insurance policy containing provisions such as were contained in these policies, wherein fraud or false swearing by the assured shall void the policy, the proof of such false swearing is sufficient to support the judgment denying recovery. It is unnecessary, therefore, for us to discuss general rules and any fine distinctions between the meaning of "fraud" and "false swearing". The court finds and, as we will later point out, the evidence amply supports such finding, that the plaintiff swore falsely in his proofs of loss, in his pleadings in this action and in his testimony at the trial with respect to the amount of the loss sustained by him in the fire in question. Having found that to be a fact, it follows as a conclusion of law that the policy is void and plaintiff may not recover thereon.

Appellant cites authorities in support of the proposition that, in order to forfeit a policy for fraud or false swearing, such fraud or false swearing must be wilful and not be the result only of inadvertence or mistake. An examination of the opinion of the trial court (see opinion, R. 181-182) shows that the court was well aware of this rule and that his decision is strictly in conformity therewith.

We will now consider the particulars in which appellant claims the evidence was insufficient to support the findings of the District Court.

The main argument on this point is found at pages 25 to 34 of appellant's brief, and is based almost entirely on the proposition that, although the proofs of loss, the pleadings and the testimony of plaintiff may have greatly overvalued and overstated plaintiff's loss, nevertheless it was not shown in the evidence that plaintiff knew of such overvaluation and overstatement or wilfully participated therein. Although it is not stated in so many words in appellant's brief, it seems apparent from a reading of the brief that appellant is now conceding that the proofs of loss, pleadings and testimony were false as to the amount of the loss sustained by plaintiff through the fire in question. He seeks refuge, however, in the claim that he himself was innocent of any wrongdoing and that the overvaluation was the work of his agents. Although, as we will later show, the authorities hold that, in a situation such as we have here, the principal is responsible for the false swearing of his agents, we will at this time discuss various parts of the evidence which support the finding that plaintiff himself knowingly and willingly swore falsely as to the amount of his loss.

Appellant's counsel in the brief points to plaintiff's own testimony to the effect that he was not in active charge of his factory and did not himself keep the books and was not familiar with them, and argues that these statements by plaintiff are conclusive. We might state at this point that the attorney now representing appellant on appeal was not present at the trial in the court below and has not had the advantage possessed by the lower court of listening to Mr. Hyland testify for five or six days in this case. His own

testimony disclosed beyond dispute that he was thoroughly familiar with all phases of his business and personally supervised it in all its details. He spent the greater part of a day describing the types of books and records, card indices, etc., that he had devised himself for the keeping of the books and accounts. He showed that he was most familiar with the amount of stock on hand and with the prices paid therefor. Appellant's argument is that he had a right to rely on the accuracy of his claim, based on the reports made to him by Hood & Strong, certified public accountants, as to the amount of merchandise which, from the records, *should have been* in his factory at the time of the fire, and that he did rely on them and did not know that they were incorrect. In the brief, appellant's counsel ignores the false swearing contained in the amended complaint and in plaintiff's testimony at the trial, and seeks to confine the issue solely to the original proof of loss. Under the authorities, however, false swearing in pleadings and in testimony in an action of this character is sufficient to void the policies.

In *Atlas Assurance Co., Ltd. of London, England v. Hurst* (C. C. A. 8), 11 F. (2d) 250, the court says:

> "The policies contained the following provision: 'This entire policy shall be void * * * in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss'.
>
> Under such a provision it is well established that a false statement knowingly and wilfully made by the insured of or regarding some matter

material to the insurance, in his proof of loss, at his preliminary examination under oath had under the terms of the policy, *or in his testimony at the trial,* with intent to deceive the insurer, avoids the policy. Clafin et al. v. Commonwealth Ins. Co., 3 S. Ct. 507, 110 U. S. 81, 28 L. Ed. 76; Follett v. Standard F. Ins. Co., 92 A. 956, 77 N. H. 457; Perry v. London Assurance Corporation (C. C. A. 9), 167 F. 902, 93 C. C. A. 302; Columbian Ins. Co. v. Modern Laundry (C. C. A. 8), 277 F. 355, 20 A. L. R. 1159; Huchberger v. Home F. Ins. Co., 5 Biss. 106, 12 Fed. Cas. page 793, No. 6821; Howell v. Hartford F. Ins. Co., 12 Fed. Cas. page 700, No. 6780; notes, 32 L. R. A. (N. S.) 453; 20 A. L. R. 1168, 26 C. J., p. 156, Sec. 191; Id. p. 382, Sec. 492."

In *Columbian Ins. Co. of Indiana v. Modern Laundry, Inc.* (C. C. A. 8), 277 Fed. 355, the syllabus reads:

"Where insured knowingly and willfully makes a false statement as to a material fact in its proof of loss, or in its testimony regarding the value of the property insured, or the loss thereto by fire, the intention to deceive insurer is necessarily implied as the natural consequence of such act, under a policy void if the insured attempts to defraud the insurer."

With respect to the claim of plaintiff that he relied on the reports of his accountants and believed they were correct, the following case is important.

In *Orenstein v. Star Ins. Co.* (C. C. A. 4), 10 F. (2d) 754, the syllabus reads:

"False statements of insured in proofs of loss, being a sworn estimate of value by one having

special knowledge, with intent that insurer, ignorant on the subject, and with unequal means of knowledge, should rely on it to its injury, were not mere matters of opinion, but false swearing, within condition of policy against it."

We will now discuss four particular phases of the evidence which show beyond a doubt that Mr. Hyland knew that the reports upon which he based his proofs of loss and his testimony were incorrect and that he knew when he swore to the amount of his loss that he was doing so falsely. We will discuss this evidence in the following order:

(a) The evidence with respect to the claim that large quantities of burlap were burned out of sight in the fire;

(b) The testimony with respect to the wrongful grading and pricing by plaintiff and his employees of the salvaged merchandise;

(c) The circumstances under which the auditors' reports were prepared;

(d) Evidence showing plaintiff's participation in the procuring of fictitious contracts to pad his loss under his use and occupancy insurance.

Of the amount of loss claimed in the amended complaint, to wit, $106,992.83, $46,000 thereof was for merchandise burned out of sight, that is, reduced to ashes or such minute particles as to be incapable of identification. The testimony of the two fire chiefs, wholly disinterested witnesses (R. 1838 and R. 1891, 1894), shows this to have been what is known as a

"flash" fire, which only burned for a short time and without any considerable amount of heat being generated. It appears that the great bulk of the material claimed to have been burned out of sight consisted of large tightly rolled bales of burlap, each containing 2000 yards of material. It would take over 300 of these large bales to make up the item of $46,000. The evidence further shows that these tightly rolled bales are very difficult to burn and require a great deal of time and heat to consume. (R. 2246.) Mr. Hyland was in and about the building directly after the fire and was there on the following morning when photographs of the fire were taken by the police department. These photographs (Exhibits C, D, E and F) show that loosely piled stacks of cut burlap which were located at the point where the fire was hottest in the building were merely scorched along the cut edges. The fireman further testified that no body of ash was found after the fire sufficient to account for the burning out of sight of any quantity of material. (R. 1837, 1850, 1893.) Mr. Hyland, observing these things, must have known that any such quantity or any considerable quantity of burlap was not burned out of sight in the fire and yet he testified (R. 235) that $46,139.46 of material were obliterated by the fire.

Inquiry was addressed at the trial to the location in the building of this material which it was claimed was wiped out by the fire. None of plaintiff's witnesses were able to point out where in the building such material was located before the fire. Plaintiff's witnesses were finally pinned down to the fact that the greater portion of the baled material which was

claimed to have been burned out of sight was located on the second floor. We might add at this point that the great bulk of the baled material was stored in the basement where there was no fire damage whatsoever. With respect to the fire on the second floor, the fireman who first responded to the alarm testified that he felt the windows on that floor and they were cold (R. 1891 and 1896), and the same witness testified (R. 1896) that the window could not have been cold if there was any considerable fire on that floor. At the trial, with the help of the model prepared by defendants, the building as it existed prior to the fire was reconstructed, and by means of models the machinery and material and stock which were found in the building after the fire were replaced, and thereafter, with the use of models of bales of burlap built to scale, the 300 bales or more representing the obliterated merchandise were placed in the building, which experiment demonstrated that there was not sufficient room therein to accommodate the material claimed to have been there to permit of the carrying on of the manufacturing in progress. Mr. Hyland was, of course, certainly aware of the fact that that quantity of material could not have been accommodated in the building so that, when he swore that that amount was obliterated by the fire, he knew he was swearing falsely. He also was in the building right after the fire and could observe the small amount of burning on the second floor where this material is claimed to have been burned out of sight.

We next turn to the evidence with respect to the prices which were used by plaintiff in making up

the proofs of loss covering the merchandise damaged or destroyed and also to the testimony with respect to the improper grading of the salvaged material. The testimony shows (R. 526 and 532) that Mr. Hyland was thoroughly familiar with the market prices and values of burlap at the time of the fire and that he did substantially all the buying and all the selling for his business (R. 574-575); and the testimony shows, without conflict, that he priced the goods far above the replacement cost to him. At pages 540 to 543 of the record, Mr. Hyland gives the prices used in his proofs of loss, which are shown to be from one and a half to two cents above the actual market cost of such material to him as of the time of the fire. Mr. Hyland's cross-examination with respect to these prices (R. 576 to 584) illustrates clearly his complete knowledge on the question of prices and shows without doubt that he knew he was fixing the prices in his proofs of loss at from one to two cents at the least above the market. In view of the fact that he had been in the business for many years and was one of the most astute and careful buyers of burlap in this vicinity, it is absurd to claim that he did not know of this overvaluation. It also appears from the testimony of defendants' witnesses, Radford and R. V. Smith, and it is even admitted by Mr. Taylor, plaintiff's bookkeeper (R. 1411), that burlap was improperly graded in the proofs of loss in that grades of burlap were listed incorrectly in order to justify a higher price therefor. This is very important in view of the fact that the grading of burlap is something that can only be done by an expert, and the

defendant insurance companies had no means of knowing of this false grading and did not discover the same until a considerable time after the fire. There is a vast quantity of testimony in the record respecting this question of price, and we have not attempted herein to make a detailed analysis of this testimony because we believe it is unnecessary so to do. The testimony of defendants' witnesses with respect to price is practically uncontradicted and is supported by market quotations and by actual contracts introduced in evidence; and the record further shows that it was Mr. Hyland himself who directed the method of pricing the burlap in his proofs of loss, which resulted in the padding thereof as above announced. (R. 981.)

We now turn to the auditor's reports which form the basis of the false and fraudulent claims made by appellant and show, from the circumstances surrounding the preparation of these reports, that plaintiff knew they were incorrect.

It appears from the evidence that plaintiff's bookkeeper kept a so-called "perpetual" inventory or stock-card summary of the goods on hand and that this inventory showed the value of the goods in the factory on the date of the fire to be approximately $88,000. (R. 447, 2290.) There was taken out of the building and identified after the fire $86,000 worth of merchandise. (R. 377.) The above-mentioned perpetual inventory was never produced by plaintiff, although frequent demands for its production were made by counsel for defendants. Unfortunately for

plaintiff, however, plaintiff's bookkeeper directly after the fire had exhibited this inventory to one of the adjusters for one of the insurance companies and a copy of it came into the hands of one of the auditors later employed by one of the insurance companies. (R. 2289.) It also appears that the value of the stock on hand in the factory on the date of the fire, as shown by the books, was approximately $89,000. There were also certain physical inventories taken from time to time. It also appears that on August 5, 1929, only two months before the fire, Hyland had received a report and inventory made as of May 31, 1929, of the books and records of the Hyland Bag Company by Ernst & Ernst, certified public accountants. (R. 255.) In the preparation of the proofs of loss, however, none of the above-mentioned inventories or audits were used. Plaintiff called in a new firm of auditors who had never done any work for him before, to wit, Messrs. Hood & Strong, and delivered to them an inventory dated December 31, 1928, showing the amount of goods on hand at that time, and directed them, using that as a basis, to compute the value of the stock of merchandise on hand at the time of the fire. According to their instructions, however, they were directed to compute this merely by figuring the cost of sales upon the percentage of gross profits of the business for the year 1928. (R. 246.) As the trial court states, this data by means of which Messrs. Hood & Strong were directed to build up the value of the merchandise was "flagrantly insufficient". (R. 190.) Hood & Strong were not informed of the Ernst & Ernst report and

inventory at the time they made their first report and were not furnished with the perpetual inventory or any books and records upon which they could accurately show the amount of this merchandise. Their report built up an inventory as of the date of the fire of $102,453.23, upon which report the proofs of loss were prepared showing a loss of $73,601.96. Nearly a year later, Hood & Strong were requested by plaintiff to prepare another report and were given entirely different data upon which to prepare the same. They were then instructed to take the Ernst & Ernst report showing the inventory on hand as of May 31, 1929, and by means of the record of purchases and sales subsequent to May 31 and down to the date of the fire, to estimate the merchandise on hand in the factory on the latter date. (R. 249.) Utilizing this method, Hood & Strong's second report estimated the value of the merchandise to be $132,947.44, which was a raise of $30,000 over their original report. Plaintiff thereupon filed an amended complaint and alleged the amount of the inventory as $132,947.44 and the amount of the loss as $106,992.83. Messrs. Hood & Strong, in preparing the last-mentioned report, confined themselves to the Ernst & Ernst report as of May 31 and to the books and records of the *Hyland Bag Company* alone with respect to purchases and sales subsequent to that date and prior to the fire. The defendants, however, went further, and through Messrs. Cerf & Cooper, certified public accountants, consulted outside sources, including the persons from whom the alleged purchases which were used to build up the inventory

had been made. (R. 2307.) Among these was H. M. Newhall & Company, a large importer and dealer in burlap. The result of this outside investigation disclosed at once what had happened and also disclosed why it was that the plaintiff employed Hood & Strong to prepare this report rather than Ernst & Ernst. Erasures and alterations (R. 2299) had been made in the books and records of the Hyland Bag Company in order to show that purchases which had, in fact, been made prior to May 31, 1929, and included by Ernst & Ernst in their inventory, were made in June and during the later months, the result being that Messrs. Hood & Strong, not having the working papers and information possessed by Ernst & Ernst, duplicated several large purchases, resulting in an overvaluation in their report of in excess of $30,000. (R. 2305 to 2313.) The erasures on the records of the Hyland Bag Company were plainly apparent at the trial, and it was obvious to the trial court that they had been made for the purpose of hoodwinking Hood & Strong into preparing a report which was erroneous. Counsel for appellant endeavors to hide behind the integrity and standing of the firms of auditors employed by him and would give the impression that the reports of the auditors were made with knowledge of all the facts. This, however, is not the truth, and it was the alteration and the changing of the Hyland Bag Company's books after the Ernst & Ernst report had been made that caused the overvaluation. When we consider that Mr. Hyland was the sole owner of this business and the beneficiary

under the policies of insurance, can we say that he did not have knowledge of these falsifications of his records?

Plaintiff produced among his witnesses Mr. George P. Colbert, an employee of H. M. Newhall and Company. Mr. Colbert was the appraiser who had been selected by Mr. Hyland to appraise the loss pursuant to the demand for appraisal made by several of the insurance companies. Following the investigation of the books of H. M. Newhall and Company, Colbert's employer, which investigation was made by the auditors for the insurance companies, certain discrepancies between the records of the Hyland Company and the Newhall Company were plainly apparent and, in view of the known friendship of Mr. Colbert for Mr. Hyland, suspicion was directed toward him, and, upon his being confronted with the evidence, he confessed to his employer that he had been bribed by Mr. Hyland to deliver to Hyland fictitious contracts upon the stationery of H. M. Newhall and Company in order to permit Hyland to pad his loss under his use and occupancy insurance. He was thereupon recalled for further cross-examination. (R. 1747.) Mr. Colbert testified (R. 1750) as follows with respect to a conversation taking place between himself and Mr. Hyland shortly after the fire:

> "A. The conversation occurred first I think over the telephone, and then later in Mr. Hyland's office.
>
> Q. Who was present at the conversation?
>
> A. Nobody.

Q. You do not mean nobody?

A. I mean Mr. Hyland, I mean no witnesses—I thought that is what you meant—just Mr. Hyland and myself.

* * * * * * *

A. The discussion was brought about in this way, Mr. Hyland asked me—we had done considerable business with Mr. Hyland's firm over a considerable period of years, and had sold a great deal of burlap to Mr. Hyland—and he asked me to have certain contracts prepared which could be cancelled, on which he could predicate the value at which goods could be replaced in making up his proof of loss.

Mr. Thornton. Q. Will you tell us just what conversations there were, and what transpired?

A. Well, the conversation ended there and the quantities, the description of the material, and the prices were left to Mr. Hyland. I furnished him with the blanks to make up the so-called contracts, because I checked the prices at that time, knowing that they were probably in line with what they could be replaced at, and then the matter was through.

Q. Were these contracts made up?

A. The contracts were made up, I did not get any copy of the contracts, and I think there was a letter written by Mr. Hyland to H. M. Newhall & Co., of which he handed me the original, and as these contracts were null and void and had no bearing on the case except price, I destroyed the letter and never put it into the file, because H. M. Newhall & Co. were not interested in it.

Q. Were those contracts signed?

A. Yes.

Q. By whom, what signature appeared upon them?

A. H. M. Newhall & Co. by George C. Colbert.

Q. What became of those contracts?

A. They were left with Mr. Hyland.

Q. Did you, in your capacity with H. M. Newhall & Co., have any authority to sign contracts for H. M. Newhall & Co.?

Mr. Schmulowitz. I object to that on the ground that the authority of the witness or an agent may not be proved out of his own mouth.

The Court. Overruled.

(Exception.)

Mr. Schmulowitz. Furthermore, I object on the ground that it calls for the opinion of the witness.

The Court. Overruled.

(Exception.)

A. No. No contract was supposed to be signed by the head of any department, except by either one member of the firm, either George A. Newhall, Jr., Almer Newhall, or Mr. Harold J. Steele, who is manager of the business—those were the only three people who were authorized to sign any contracts or checks.

Q. Who prepared these contracts?

A. Mr. Hyland prepared them.

Q. Did these contracts actually cover the sale or purchase of the merchandise?

A. No, merely an indication, for which they were given, that certain goods, certain shipments could be replaced at a certain price.

Q. Was there anything said as to these contracts being used for any purpose?

Mr. Schmulowitz. I object to that question, in addition to the other objections, upon the ground that it is leading and suggestive.

The Court. Overruled. (Exception.)

A. Mr. Hyland assured me that these contracts would never be used.

Q. Did you ever report anything about these contracts to Mr. Almer Newhall, or Mr. George A. Newhall, Jr., or Mr. Steele?

A. No, I did not."

The testimony of Mr. Colbert with respect to these contracts was fully borne out by the testimony of Mr. A. M. Newhall of Newhall and Company (R. 2078, 2079), and by that company's records, and it also appears without dispute that these fictitious contracts were used by Mr. Hyland for the purpose of fraudulently padding his loss in connection with his use and occupancy insurance; and it further appears from Mr. Hyland's books that payments for services were made by Hyland to Colbert. If there was nothing else in the record, this testimony alone would shatter completely the claims now made by Hyland's counsel in his brief before this court, that he himself was innocent of any fraud or false swearing. The testimony not only clearly demonstrates the character of man Mr. Hyland is, but shows that he was most active himself in the preparation of the data and evidence which he used to support his fraudulent claims.

Counsel makes complaint of the statement in the court's opinion that the merchandise burned out of sight was the "heart" of plaintiff's claim. As plaintiff presented his claim at the trial, it represented $46,000 of a total amount of $108,000 of his claim. It was therefore a substantial part of his fraudulent

claim. It is also a portion of the claim which the evidence most overwhelmingly shows to have been fraudulent.

The foregoing section of our brief, we believe, disposes of all of appellant's arguments with respect to the sufficiency of the evidence and, if the evidence was sufficient to sustain the court's finding that plaintiff's fraud and false swearing were wilfully made, the authorities cited on pages 44 to 47 of appellant's brief, of course, have no application.

We have only touched a few of the salient points in the testimony herein, but these points that we have dwelt upon, concerning which there is practically no contradiction in the evidence, seem to us to so clearly support the lower court's holding that Hyland wilfully swore falsely with respect to his loss that we do not deem it necessary to burden this court with further repetition of the same character. We will, therefore, now pass to other points made by appellant.

III.

ALTHOUGH THE EVIDENCE SHOWS WITHOUT QUESTION THAT PLAINTIFF HIMSELF PARTICIPATED IN THE MAKING OF FALSE PROOFS AND DID SO WILFULLY, NEVERTHELESS, UNDER THE AUTHORITIES HE WOULD BE RESPONSIBLE IF THEY WERE MADE BY HIS AGENT OR AGENTS.

Plaintiff attempts to escape from the consequence of the false swearing by blaming his agents. He states that the proofs of loss were prepared by Mr. Sugarman, his adjuster, and that the books and records

were kept by Mr. Taylor, his bookkeeper. Although we have shown above that Hyland personally knew of the fraud and false swearing and participated therein, nevertheless, if he claimed that he entrusted the preparation of these proofs and reports to his agents, he must suffer the consequences of false swearing by them.

In *Mick v. Corporation of Royal Exchange Assurance of London, England* (1914, N. J.), 91 Atl. 102, 52 L. R. A. 1074:

> "Where an insurance policy provided that it should become void in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after a loss, and the insured delegated to agents the duty of doing everything required to make complete proof of loss, without question or supervision, held that the act of such agents in presenting false and fraudulent vouchers to the company pursuant to demand was imputable to the insured, and that the policy was vitiated."

In *Saidel v. Union Assur. Soc., Ltd.* (1930, N. H.), 149 Atl. 78, the syllabus reads:

> "Under fire policy providing that it shall be void if insured attempts to defraud company either before or after loss, insured is chargeable with the fraud of his agent while acting in his behalf.
>
> "Intentional overvaluation of property destroyed by fire on part of insured, or agent, in order to have insurer pay full insurance, releases insurer from liability under provision of fire

policy that it shall be void if insured attempts to defraud company before or after loss.

"False statements, recklessly made with conscious indifference as to truth and without caring whether statements are true or false, constitute fraud."

In *Kahn v. Liverpool & London & Globe Ins. Co.* (1925, N. J.), 130 Atl. 436, the syllabus reads:

"Where vouchers were altered after a fire loss to defraud insurance company, it is immaterial whether alteration was by insured or his agent, since a principal cannot take advantage of agent's fraud without assuming responsibility therefor."

The argument contained between pages 48 and 60 of appellant's brief to the effect that Mr. Hyland cannot be held responsible for any false swearing by his agents, we believe, needs no reply, in view of what we have already stated herein. The only authority cited by counsel in support of this argument is from a dissenting opinion in one of the cases above cited by us.

IV.

THERE WAS NO WAIVER OF THE DEFENSE OF FALSE SWEARING.

At page 34 of appellant's brief, the point is made that by reason of the demand for appraisal and the participation in the auction by the insurance adjuster representing some of the companies, the defendants waived the defense of fraud or false swearing.

There is nothing to show that the defendants when they received the proofs of loss had sufficient information upon which to predicate a charge of false swearing. The facts developed from time to time thereafter, and plaintiff more than a year after the fire raised his claim over $30,000, which, of course, could not have been anticipated by the defendants at the earlier date. Waiver is, of course, the voluntary relinquishment of a known right. We submit there is nothing in the testimony to show any waiver by any of the defendant companies. The following authorities treat with the subject of waiver.

In *Couch, Cyclopedia of Insurance Law,* Volume 7, page 5602, it is said:

> "And a provision that false and fraudulent swearing as to loss shall vitiate the policy is not waived by an appraisal, or by an attempt by an adjuster to arbitrate the loss."

Maple Leaf Milling Co. v. Colonial Assurance Co. (Can. 1917), 36 Dom. Law Rep. 202. There action was brought upon a policy of fire insurance, which insured the goods of one Denby in his store. The policy was assigned to the plaintiff subsequent to the fire which caused the loss. The policy contained a condition requiring the insured to furnish an account (proof) of the loss with a statutory declaration that the account was just and true, and another condition providing that any fraud or false statement in the statutory declaration should vitiate the claim. It was found that the statement in the proofs of loss that $2000 worth of goods were destroyed "out of sight" was false, and

was deliberately and purposely made. The plaintiff claimed that such condition (false statement) was waived, first by an appraisement of the loss in which defendant took part, and, secondly, by an arbitration. But there was no actual appraisement, the insurance company adjuster merely denying that any goods had been burned out of sight. The court held that there was no waiver and that the fraudulent claim vitiated the whole claim. The holding of the court was concisely set forth in the syllabus:

> "A false statement by the insured in his statutory declaration as to the loss, by which the actual loss is greatly exaggerated, vitiates the claim under a condition to that effect in the policy; an appraisement of loss, or an endeavour to arbitrate the claim by an adjuster for the insurance company, does not operate as a waiver of, nor could he so waive, the condition."

In *Globe & Rutgers Fire Ins. Co. v. Stallard* (1934), 68 F. (2d) 237, the court, in discussing overvaluation in proofs, says at page 241:

> "It is not correct to say that this overvaluation was immaterial; for the right to recover the full amount of the $4,000 policy was dependent upon showing a value of $8,266.66. And it is no defense to the false swearing, if false swearing it was, that further proofs of loss had been waived by the conduct of the adjuster; * * *."

Aetna Ins. Co. v. Itule (Ariz., 1923), 218 Pac. 990, 25 Ariz. 446. Action was brought upon a policy of fire insurance to recover on account of loss by fire, damag-

ing the furniture and fixtures of a theatre. The insurers declined to pay the loss on the ground that the plaintiffs had violated the insurance contract by incumbering the insured property by a chattel mortgage and by failure to disclose the existence of such mortgage and the nature of their interest in the insured property in their proof of loss. The policy provided it should be void if the personal property insured became subject to or encumbered by a chattel mortgage —also that the policy was void "in the case of any fraud or false swearing by the insured touching any matter relating to this insurance," whether before or after a loss.

Judgment was rendered for plaintiffs who claimed that the forfeiture had been waived by the act of the insurance adjuster in calling for proof of loss and demanding examination of the plaintiffs under oath after the information had come to him of the existence of the mortgage—which the adjuster had learned of after the fire. In reversing the lower court's judgment, the appellate court said, at page 992:

> "In any event, the appellees cannot be heard to base any right upon the action taken by the adjuster upon the faith of their own sworn statement. The agent had a right to assume that the appellees knew whether there was a mortgage still in existence, and also had a right to assume that the appellees were not perjuring themselves. It seems somewhat strange that they should blame the adjuster for either one of these assumptions. It might have been that the mortgage had been paid off and discharged before the fire.

The appearance upon the record of such a mortgage was far from conclusive of its existence at the time of loss, and the agent undoubtedly had the right to take the appellees at their word under oath.

While the law abhors a forfeiture, it must sometimes enforce it. Waiver of a right, even the right of forfeiture, cannot be predicated upon a course of action into which one has been lured by a false statement of those claiming the benefit of the forfeiture. It is elementary that waiver is an intentional relinquishment of a known right. Currie v. Continental Casualty Co., 147 Iowa, 281, 126 N. W. 164, 140 Am. St. Rep. 300."

V.

THE COURT DID NOT ERR IN CONSIDERING THE SUSPICIOUS CIRCUMSTANCES SURROUNDING THE FIRE AND THE EXCESSIVE AMOUNT OF INSURANCE IN PASSING ON THE QUESTION OF THE FRAUD AND FALSE SWEARING.

Counsel has furnished no authority in support of these points, and we believe the matter is amply disposed of by the statements of the trial judge concerning the same in his opinion. (R. 179.)

VI.

THE QUESTION OF ARBITRATION.

As this appellee did not participate in the attempted appraisement, we will leave the argument on this point to counsel for the companies who were involved therein.

CONCLUSION.

In conclusion, we respectfully assert that there is no basis whatsoever for the sustaining of this appeal and that the judgment of the lower court should be affirmed.

Dated, San Francisco,
April 17, 1936.

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